IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 132.

THE PEOPLE'S GAS LIGHT and COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLEE.

MAY IT PLEASE THE COURT:

Appellant filed a bill and amended bill, in the United States Circuit Court, attacking an ordinance of the City of Chicago, which provides that the price of gas furnished to consumers throughout the city shall not exceed the sum of seventy-five cents per thousand feet.

Appellant sets out in its amended bill that under its special amended charter, passed by the Illinois legislature in 1865, it had a contract whereby the city could not reduce the price below the sum of three dollars per thousand feet, and that by virtue of its having taken advantage of the Gas Consolidation Act of 1897, by merging with many other companies set out, it had still a contract whereby the city was prohibited from reducing the price

of gas below the sum of one dollar per thousand feet and that it was charging one dollar.

That the passage of the ordinance complained of constituted an impairment of that contract.

Furthermore, the amended bill set out that the city council had no power from the state whereby it could pass an ordinance fixing the rates to be charged by the appellant company for gas.

The demurrer to the original bill was sustained and the court's opinion is published in 114 Federal Reporter, page 383.

The demurrer to the amended bill was also sustained, but for some reason the opinion was not published.

We append the second opinion, as it now stands after an amendment suggested by the court, as Appendix A.

By the decree entered sustaining the demurrer to the amended bill the court ordered that the amended bill be dismissed upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois.

From that decree this appeal is prosecuted.

The appellee, the City of Chicago, respectfully urges that the decree dismissing the amended bill should be affirmed upon the express grounds:

I.

THAT APPELLANT HAS NO CONTRACT, EITHER BY VIRTUE OF ITS CHARTER ACT OF 1865 OR OF ANY PROVISION OF THE GAS CONSOLIDATION ACT OF 1897, WHEREBY THE CITY COUNCIL IS PROHIBITED FROM REDUCING THE PRICE OF GAS TO A REASONABLE SUM.

II.

THAT THE CITY OF CHICAGO IS EMPOWERED BY THE LEGISLATURE TO REGULATE THE PRICE OF GAS FURNISHED AS WELL BY THE OLD PEOPLES' COMPANY AS BY THE CONSOLIDATED PEOPLES' COMPANY, BOTH BY THE CHARTER ACT OF 1865, AND BY THE CITIES, VILLAGES AND TOWNS ACT OF 1872.

For convenience we will discuss the points involved under the following heads:

I.

THE CHARTER ACT OF 1865 GRANTS NO CONTRACT OF IMMUNITY TO THE ORIGINAL PEOPLES' GAS, LIGHT AND COKE COMPANY.

II.

THE ACT OF 1897 CONTAINS NO LANGUAGE WHICH VESTS IN CORPORATIONS ACCEPTING ITS PROVISIONS ANY CONTRACT OF IMMUNITY, AS CLAIMED.

III.

THE CITY IS GIVEN THE RIGHT TO REGULATE THE PRICE OF GAS FURNISHED BY THE ORIGINAL PEOPLES' COMPANY, AFTER THE YEAR 1875, BY THE CHARTER ACT OF 1865.

IV.

THE CITY ALSO DERIVES THE POWER TO REGULATE THE PRICE OF GAS FROM THE CITIES, VILLAGES AND TOWNS ACT OF 1872.

V.

EVEN IF THE ORIGINAL PEOPLE'S COMPANY ENJOYED THE IMMUNITY CLAIMED, BY VIRTUE OF THE CHARTER ACT OF 1865, IT LOST THE SAME UNDER THE TERMS OF THE ACT OF 1897, BY GOING INTO THE CONSOLIDATED COMPANY.

I.

Appellant claims that under the terms of its charter act of 1865, the original People's Gas, Light and Coke Company enjoyed a contract by the terms whereof the legislature agreed that it would never empower the city to lower the price of gas below the sum of Three Dollars. There has been some little uncertainty in the position of different counsel as to just what the terms of their alleged contract are, but in appellant's brief in this court counsel states that the contract claimed is one made by the legislature to the effect that the City Council would never be authorized to compel the original People's Company to furnish gas at a less rate than three dollars.

This court, in construing grants from the legislature to public-service corporations such as this, invariably takes that meaning of the grant which is most favorable to the public and take all intendments against the corporation.

Where any ambiguity arises it is resolved in favor of the public.

So necessary has the court found it to be to guard the public against the greed and aggressions of this class of corporations that in almost every case where ambiguity arises, the decision has been against the grant claimed by the corporation.

This is particularly true in all cases where governmental control of the rates to be charged by these corporations is involved. Wherever a corporation claims immunity from this branch of the police power, for such this control of rates is, the legislative act claimed to grant the immunity is scrutinized by the court with an eye jealous for the public right and invariably where an ambiguity appears in the act, the doubt is resolved against the corporation. The case at bar particularly appeals to this rule of conduct followed by the court, because it is claimed that on the face of the original act the legislature contracted that the city would never under any circumstances be authorized by the legislature to regulate the price of gas below the sum of three dollars.

Recognizing the enormity of the position taken, appellant seeks to escape some of the odium attached thereto by arguing that it voluntarily reduced the price from three dollars to one dollar and that by the terms of the Consolidation Act of 1897, they now have a contract by which the legislature will never authorize the city to lower the price below one dollar. But the confession and avoidance will not help them. In interpretating the Act of 1865, it must stand by itself, unaided by any subsequent voluntary surrender.

If it was at all such a contract as appellant claims, it was a contract that the company should be enabled to maintain the unconscionable rate of $3 forever, undisturbed by the city. The validity of the claim of a contract must rest on the act as it was passed, without any helping out by subsequent surrenders or by the provisions of subsequent legislation.

The original act either vested a contract in appellant in strict terms or it did not.

It is submitted that under the decisions of this court, the reading of the act makes appellant's position absolutely untenable.

The original People's Company got its first franchise by the Act of 1855.

By Section 4 of that act it was provided that the company might charge a maximum rate of two dollars to the city and two dollars and fifty cents to all other consumers. The act is silent as to any power of the city, except to provide that the operation of the company in Chicago was subject to the consent of the city. By the Act of 1865, its operation in the city, is still to be only "with the consent of the Common Council of said city," but the company was empowered to increase its capital stock, etc., and by Section 3, it was provided that Section 4 in the old act, fixing rates, should be repealed and the section then reads:

"But ten years after the passage of this act the Common Council of the City of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said Common Council of the City of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

It is from this language that appellant claims it derives its contract.

If, in this language, however, there be any ambiguity, then the court will construe the same most favorably to the public.

The claim by such a company that it has a contract granting it immunity from regulation as to rates will not be allowed unless the surrender by the public is made by explicit and unmistakable language. The surrender

will never be sustained, by implication and will never be established by ambiguous terms. An ambiguous phrase must always be interpreted in favor of the public. To this effect are the following cases:

Georgia Banking Co. v. *Smith*, 128 U. S., 174.
Freeport Water Co. v. *Freeport City*, 180 U. S. 587.

And following cases.

Covington & Lexington Turnpike Co. v. *Sandford*, 164 U. S., 578.
Charles River Bridge case, 11 Peters, 547.
Delaware R. R. Tax case, 18 Wallace, 225.
Stone v. *Farmers' L. & T. Co.*, 116 U. S., 307,

and accompanying cases.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362.

And following cases.

City of Covington v. *Kentucky*, 173 U. S., 231.
Chi., Mil. & St. Paul Ry. v. *Minnesota*, 134 U. S., 418.

In the Freeport case, 180 U. S., 587, the water company's ordinance provided that the rates set out therein should *not in any way be changed except by mutual consent*, and the company contended that that language constituted a contract in them. Yet this court held that the language was not sufficiently explicit to surrender the city's power to regulate. On p. 599 the court says that the power of regulation, if any doubt exists, must be resolved in favor of the municipality; that if the power can be bargained away at all, it can only be by *positive words and intention*. On p. 600, the court says:

"Of the two constructions that must be adopted

> which is *most favorable to the public,* not that one which would so tie the bands of the council that the *rates could not be adjusted* as justice to both parties might require at a particular time."

No limitation on the power of the city to regulate rates can be upheld by implication; it must be established by language in the contract clear and explicit.

In the Danville case, 180 U. S., 619, the charter to the water company provided that rates detailed therein should be paid *during the life of the franchise,* yet the court held that the City Council could thereafter regulate rates.

In the Stone case, 116 U. S., 325, the language of the company's charter was that the *company should fix its own charges from time to time.* The Supreme Court held that the power to fix charges granted was limited by the *rule* of the *common law, which required all charges to be reasonable,* and that the state's power to make them reasonable had not been surrendered.

In the Railroad Commission case, 116 U. S., 307, the charter gave the company the right to "fix, regulate, and maintain tolls and charges." The court held that the state could regulate charges, that if the state's power could be bargained away at all it could only be done by *"words of positive grant";* that any reasonable doubt of the meaning of the charter must be resolved in favor of the public.

In the Railroad Commission case, 116 U. S., p. 347, the charter gave the company the right to "adopt and establish such a tariff of charges * * * as they may think proper," and the same to "alter and change at pleasure."

In the case on p. 352, the language was "to receive * * * such tolls and charges as shall be from

time to time established, fixed, and regulated by the directors."

In Covington Turnpike case, 164 U. S., 578, the charter provided that "the legislature reserves the right to reduce rates * * *," so that the company should make fourteen (14) per cent. dividend, "and no more." By a subsequent act in 1851 the corporation was divided into two, "each company possessing and retaining all the *powers, rights and capacities*" of the old company. The court held that the rates of the new company were subject to regulation by the legislature. On p. 588, the court says that the Act of 1851 (dividing the company) is *susceptible of the interpretation* that the state intended to extend to the new companies the right to maintain the original limit of income, but that the *other interpretation* reserving to the state the right to regulation must be adopted. This case is particularly instructive, because there was an apparent right to a certain rate inviolable, with a reserved right of regulation above that rate. The same claim is made here, that the right reserved to the city is only active above the limit of three dollars.

In all the cases the claim was vigorously urged that the charter constituted a contract, giving the company in each case immunity from regulation.

In all these cases and many others of similar nature before this court, the claim was rejected because the interpretation in each case must be against the corporation.

So, in the case of *Georgia Banking Co.* v. *Smith,* 128 U. S., 174.

The company's charter contained the following language:

"Provided, that the charge of transportation or conveyance shall not exceed 50 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every one hundred miles, and 5 cents per mile for every passenger."

The Constitution of Georgia (1877) authorized the legislature to "regulate freight and passenger tariffs." The Act of 1879 created a Board of Railroad Commissioners who were to fix rates.

The railroad company contends this impairs the obligation of its contract. The court says:

"It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.

Stone v. *Farmer's Loan & Trust Co.*, 116 U. S., 307.

Dow v. *Beidelman*, 125 U. S., 680.

"The incorporation of the company, the grant to it of special privileges—particularly right of eminent domain, and obligation to transport all persons and property upon like conditions and reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control.

"So long as use continues, the *power of regulation* remains, not merely as to provisions for security and convenience, but also *to prevent extortion by unreasonable charges* and favoritism by unjust discriminations.

"This is not a new doctrine, but old doctrine, always asserted whenever property or business is by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use.

"Differences of opinion have existed among judges of this court as to conditions under which some kinds of property or business may be properly held to be thus affected as in *Munn* v. *Ill.*, 94 U. S., 113, but none as to the doctrine that when such use exists the business becomes *subject to legislative control* in all respects necessary to protect the public against danger, injustice and oppression.

"The question arises whether the 12th section of charter (containing above clause) is a contract that it may make any charges within limits there designated. It contains no stipulation, nor is any implied, as to any future action of the legislature. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, *the legislature*, had in 1833, *contracted* that the company *might, for all time, charge rates for transportation of persons and property* over its line *up to the limits* there designated.

"It is conceded that a railroad corporation is a private corporation, though its uses are public, and *that a contract embodied in terms in its provisions*, or *necessarily implied* by them, is within the constitutional clause prohibiting legislation *impairing the obligation of contracts.*

"*If the charter* in this way provides that the charges of the company shall *be subject only to its own control* up to the limit designated, *exemption from legislative interference within* that limit *will be maintained.*

"But to effect this result, *the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state.*

"There is no such language in the present case."

In the case of *City of Covington* v. *Kentucky*, 173 U. S., the power was granted to erect and carry on water works and the statute provided that:

> "Said reservoirs, machinery, etc., with the land upon which they are situated, shall be and remain forever exempt from state, county and city tax."

The court holds that this act was subject to repeal because a contrary interest was not plainly expressed—there being room for doubt.

In *Rogers Park Water Co.* v. *Fergus*, 180 U. S., 624, the ordinance to the water company provides:

> "The said grantee or assigns shall charge following annual water rates during existence of this franchise. * * *"

This ordinance fixed rates for private as well as public water supply.

The court says, reading on page 630:

> "This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away, and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding."
>
> "There is no complaint in this case that the rates fixed by City of Chicago were unreasonable. Plaintiff in error relies strictly on contractual right. We think it has no such right."

In the light of these decisions it is respectfully submitted that there is no such unmistakeable language here as gives appellant the contract claimed.

The three dollars named in Section 3 is but the legislative opinion that at that time the sum of three dollars is a reasonable charge, but the act does not provide that the same shall forever remain the minimum rate.

As the court says in the Georgia Banking and R. R. Co. cases, it will require much clearer language than that used in Section 3 to persuade the court that the legislature had in 1865 contracted that notwithstanding the probable altered conditions, the Gas Company might for all time charge this sum of three dollars free from municipal interference.

And, as in the Rogers Park case, there is no stipulation that the conditions warranting the fixing of the price at $3 in 1865 would continue forever.

And the court will note the conditions which made the price of three dollars reasonable in February, 1865, when two dollars and two 50/100 dollars was reasonable ten years earlier. It was because of the war of the rebellion still pending—the debased currency of that day—the legal tender dollar being worth forty cents only, and the high war prices.

The language of this act requires the same reasoning followed by the court in the Freeport Water Company case.

One interpretation is in favor of the public and one in favor of the corporation.

By this Section 3 the legislature reserves to the city council its own confessed right of regulation.

The Act reads:

> "But ten years after the passage of this act the Common Council of the City of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas. * * *"

The intention here is complete and unambiguous. Now, how is this power to be interpreted in the light of the next clause, which is ambiguous?

The two clauses must be construed together. The first part seems to express what the legislature intended, that after ten years, when the debased currency and the war prices, caused by the dying Confederacy, should have passed away and normal conditions should have returned, the city council should regulate the price of gas. The doubt resting in the language of the second ~~point~~ clause should not be interpreted to defeat this clear intention. The hands of the council should not be forever tied by this ambiguity.

The reservation of the public right to the council should not be made useless and of no avail from its inception. As said in the Freeport case, the second clause must be interpreted so as to make the reservation to the city "most favorable to the public, not in such manner as would so tie the hands of the council that the rates could not be adjusted, as justice to both parties might require at a particular time."

The court, by holding that appellant derived a contract in and by the ambiguous language would confessedly tie the hands of the council absolutely. Before 1875, the end of the ten years, appellant had voluntarily lowered its rates below the three dollars, thus confessing that without such voluntary action the city council might well have utilized its power immediately upon the expiration of the ten years. The fact that the legislature makes the reserved power in the city available only after ten years shows conclusively that the interpretation claimed by appellant must be rejected. If the legislature intended that for all time the city's power should be limited to the

three dollars, the act would have provided that from and after the date of its passage the city's reserved power would be limited forever.

It was in the minds of the legislature that in 1855 two dollars and two and a half were the reasonable rates to be charged by the Peoples' Co. That rates had become unreasonably low by the extraordinary condition caused by the war. But the rebellion was already engulfed in its own ashes, the legislature apprehended that in time conditions would be restored.

The three dollar rate would become unreasonable. The conditions in Chicago would always be more intelligently apprehended by the city council than by the State Legislature, its membership drawn mostly from rural counties. As it was certain conditions would change, the legislature determined that the charges should be *publicly regulated* to meet those changes.

It is evident that the legislature was looking to public regulation—that was in their minds.

This court has said in a case passing on the interpretation of these grants to public service corporations, that one reason for interpreting them against the corporation is that they are drawn usually with great care on the part of the agents of these corporations and with more or less good nature and heedlessness from the standpoint of the public.

There is no reason to suppose that the Peoples' Company's agents were any less active than in other cases. It is certain that the company was clamoring to get away from the two and a half maximum rate.

The legislature was willing to give it temporary relief, but wanted to arrange for a return to normal conditions,

and had resolved that the city council should determine when a change back would be reasonable.

The company's agents evidently prevailed on the legislature to delay its regulation for ten years, thus securing a good, long time within which to recover from war conditions.

This court has held, in the case of *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S., 238, that the facts surrounding the passage of a legislative act are useful in determining what is the meaning and scope of the act.

With this in view, an examination of the House Journal of the legislature of 1865 will be most convincing that appellant's claim is unfounded as to deriving any contract of ~~exemption~~ by its charter.

On page 391 of the House Journal of Illinois, 1865, it appears that on January 25th of that year one Mr. Childs offered the following amendment to that bill—it being House Bill No. 134 of that session:

> "Insert: '*Provided*, the present rate of charges for gas shall not be increased longer than two years from the passage of this act; and further, that no charge for the use of gas [or] meters shall be made during that time, and during that time (the company) shall not charge more than four dollars per thousand feet."

By this it appears that at that date the company's agents had secured the repeal of Section Four of the old act by which the maximum rate of two dollars and a half was fixed as the limit, and the company was to have the right to charge a higher rate. Mr. Childs is trying to limit the duration of the over-charge to two years, and trying to limit the higher rate to four dollars.

Undoubtedly discussions took place, and hot ones.

Mr. Childs did not succeed in getting his two-year lim-

itation, but a compromise was effected, the rate was to be unlimited (unless legislature interfered) for ten years instead of four dollars for two years.

It must be admitted that the Gas Company's people got the best of Mr. Childs, but his efforts have served well to show how this provision must be interpreted.

After the ten years the city is to have the right of regulation. The old Gas Company was not endangered thereby, that regulation must be reasonable, under the common law.

Being reasonably certain of the particular legislature the company's agents threw in the last clause, that pending the ten years, the city should *in no case* be authorized to reduce the gas rate below three dollars, hoping thereby to check subsequent legislatures.

Under all these circumstances it is clear that the mention of the rate of three dollars is, in the light of the Georgia Banking Co. case and the Rogers Park Water Company case, only the expression of the legislature that at that time, and for the following ten years, three dollars is a reasonable rate. But there is no contract that the legislature will never delegate its rate-fixing powers to the municipalities of the state, generally.

And there is no provision that the City of Chicago will, *at no time* after the ten years, have the power to regulate below the three dollars.

The language must be construed in favor of the public reservation, and therefore the court will hold that the three-dollar limit is only intended to last during the ten years.

It is conceded by counsel that the legislature retained the right to regulate at all times, therefore they must concede that it retained that right during the ten years.

The company's agents, fearful that at a subsequent session the legislature might think better of it, then secured the proviso that *in no case* (no matter how soon conditions would be restored) would the legislature authorize the City Council, prior to the time it was to take full charge of the regulation, to lower the price below the sum of three dollars. The legislature was willing to postpone the lowering of the price by the city below three dollars, for ten years.

It is not necessary to discuss whether the proviso to that effect was or was not valid, but that is certainly the strongest interpretation appellant can ask.

Any more favorable interpretation would defeat the legislative will, already clearly expressed in the first part of the provision, would resolve all doubts in favor of the corporation and would so tie the hands of the public that "the rates could not be adjusted, as justice to both parties might require at a particular time."

The agents of the company were so far successful that they had color of claim that they had postponed the evil day for ten years.

The court will not so construe the act that evil intentions can be charged against the legislature of that day.

It will construe the act as a legislative expression that in 1865 three dollars was a reasonable rate for gas, and that under all due conditions such rate would be reasonable for ten years. No other interpretation, it is submitted, could be put upon the section, without imputing evil motives.

Certainly such an interpretation will not be made as will show the legislature to have been masquerading, pretending to reserve to the public an important governmental function, and at the same time so framing it as to be on its face a pretense and a fraud.

Appellant assumes to believe that the legislature intended to protect the company from unconscionable and one-sided regulation by the council.

But if such danger were in their minds why reserve any power at all to the council?

There was no necessity for such action, if such danger existed.

If such were the case, why reserve any power to the city at all; why not retain the governmental right exclusively in the state, as by the former Act of 1855, whereby all that the city was given was the right in its consent —ordinance to retain such contractual right as the company would agree to?

From every standpoint that can be taken, it is evident that the legislature intended to reserve to the city this governmental power after the ten years, and that a power in the city must be so interpreted as to be a going power, not a mere masquerade and pretence.

Moreover, the assumed danger which appellant says was sought to be avoided never did and could not exist.

This court has from the earliest decisions preserved the public right to regulate rates. It is held to be a branch of the police power of the state. Where interpretation is necessary, the court has always decreed the right to be retained in the public.

Those interpretations all aid our contention, because this Act of 1865 is a grant to the gas company and, by

this Section 3, the right is reserved in the city. The same favorable interpretation must be given to this reserved right as if in terms it was reserved to the state itself.

If this right were fraught with danger to property rights, as argued by counsel, would this court have adopted the rule of invariably interpreting any doubt in favor of the right?

The pretense that the object of the legislature was to protect the People's Company from a danger falls of its own weight.

Under the common law such a corporation was protected against any danger. The right of regulation always rested in the public, but the regulation must always be reasonable.

Stone v. *Farmers' Loan and Trust Co.*, 116 U. S., 307

Providence Banking Co. v. *Billings*, 4 Peters, 514.

Stone v. *Illinois Central R. R. Co.*, 116 U. S., 347.

But counsel expressly admits that the legislature retains the right to regulate rates after the Act of 1865. It would seem that this concession was forced out as a second attempt to escape the odium of maintaining a claim of right to charge this unconscionable sum of three dollars perpetually.

Appellant says, "Oh, no, the city has no right to lower the rate below three dollars at any time (will the court note that any attempt to state appellant's position so that it sounds in the least plausible forces the interpolation of the words "at any time" into this clause in Section Three? In fact, counsel, in his argument, to make

his position reasonable, is forced to the same interpolation—the words themselves do not appear in the act, nor do any equivalent words) but the state retains the right to regulate the price, so no claim can be raised that an unconscionable monopoly was created."

But it is a late repentance. The concession is made not to recognize public rights, but to ward off the effect of a claim so far against public policy and against the rulings of this court.

It is difficult to see how appellant's position can be maintained.

When it concedes the fact that the legislature has not parted with the power to regulate, it surrenders its claim to a contract.

The power to regulate means the governmental power of regulation, a branch of the police power undoubtedly, to be exercised at subsequent sessions of the legislature, according to the discretion of the legislators of that day.

In their discretion those legislators undoubtedly would have the power to delegate this authority to the municipalities themselves. Therefore you have appellant in the impossible position of conceding legislative authority unsurrendered and claiming its surrender in the same breath. It is a very different matter to say that the legislature can contract with a gas company that it shall maintain a certain rate, unaffected by legislative action, for a given time, and to say that the legislature can itself retain the right to regulate and yet have no power to delegate that right to the municipality, its agent.

It cannot be said that the legislature retains the right to regulate, yet has bartered away the discretion of future legislatures, as to how that right of regulation shall be enforced.

The court, in the New Orleans Gas Light cases, 115 U. S., has said that the legislature can make the contract direct, but it has never said, and we respectfully submit it will never say, that the legislature can so barter away the governmental discretion of future legislatures. Forced by the necessities of its position in maintaining a claim so obnoxious to the uniform attitude of this court on such questions, as well as by the clear language of the act itself, appellant must concede that the legislature has not parted with the right of regulation.

The concession carries with it one that the legislature has not parted with the right of delegation; otherwise the right of regulation would not exist.

But when the statement is made it is but another way of expressing the rule of this court that all grants to these corporations must be construed against the corporation, and that a surrender of this governmental power is never implied, but can only be found from exact and unmistakable language.

By counsel's concession we come to the same point:

The act of 1865 gives no contract of immunity to the original People's Company. By the same reasoning and on the strength of the same authorities, the city is given thereby the full power of regulation after 1875.

II.

Appellant's second claim is that, having voluntarily accepted the provisions of the Act of 1897, and having entered into a merger with the other companies enumerated, the Consolidated Company now has a contract to charge the rate of one dollar forever, so far as the city is concerned.

It can reach this conclusion only in one of two ways:

First: It must read into Section 3 of the Act of 1865 the explicit and unmistakable words which this court requires shall appear in an act in order to work a surrender of this governing power. It must read into the Act of 1865 the provision that the legislature will never at any time permit the city to lower the price below the sum of three dollars, and that if the People's Company enters into any combination or consolidation or otherwise changes its form in the future, the legislature will never permit the city to lower the price of gas below some other sum in some way fixed at the time of such consolidation.

There can be no successful contention but that this language must appear in the Act of 1865, if appellant is to enjoy a contract to charge one dollar, free from regulation by the city, otherwise than by the explicit language of the Act of 1897. In the same way that, under the Act of 1865, it can enjoy no immunity from city control except by explicit language of the act itself, so if the Act of 1865 does not explicitly provide for the contingency of a consolidation, sale, lease or merger, the language of the Act of 1897 must anew, by explicit and unmistakable language, give appellant the much desired immunity.

This court has forever settled the status of those companies, claiming immunities after consolidations, sales, foreclosures, assignments, leases and all other changes, in a long line of cases, the Lexington Turnpike case and others, which we will discuss in another place. Under these decisions, the immunity, if any, given by the Act of 1865 will be lost upon a consolidation such as has occurred here, unless the Act of 1865 expressly provides that that immunity shall extend to all future changed conditions and transfers.

Granting for the sake of the argument that immunity for all time was granted by the act of 1865 to the old company, not one word appears, extending or attempting to extend such immunity to any new or consolidated or merged company. Under the Act of 1865, therefore, the immunity, if it ever existed, is lost.

II. As no explicit language in the Act of 1865 carries the immunity claimed over to the consolidated company, appellant must derive its contract, if any it has, from clear and explicit language granting the same in the Act of 1897.

The sum selected by appellant as that covered by its alleged contract is obtained by the provision of the eleventh section of the act, wherein it recites that the consolidated company shall charge no larger sum than the lowest sum charged by it during the year preceding the consolidation. Appellant states that sum to be one dollar.

In order to maintain its position, appellant must show in the act plain and explicit language to the effect that the consolidated company is thereby vested with the power to charge the rate found, as provided in Section 11, for all time, without regulation by the public.

Not one word of that nature appears and not one word in the most remote degree treating of any right in the company to any particular rate for any particular time, and not one word limiting regulation at all, either in the state or city.

And in the face of the uniform decisions of this court that only by the most certain and explicit language can this important governmental power be surrendered, and of the equally certain and uniform decisions that only by explicit language to that effect in the original act can a right of immunity in one of these corporations go to a

successor or into a merger or consolidation, appellant disregards the complete silence of both these acts on the subject and still claims.

It is respectfully submitted that, even if any immunity ever existed in the old People's Company, in the failure of both these acts to empower the old company to carry its immunities into the consolidated company, or to preserve the immunities when entering into a merger, and in the failure of the Act of 1897 to create any new immunity in any consolidated company, the appellant, having taken advantage of the Act of 1897, is now without the immunity charged.

Section 11 of the Act of 1897 reads as follows:

> "Any corporation * * * into which any company or companies are consolidated and merged under this act * * * shall be subject to the following provisions:
>
> "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such * * * consolidation and merger."

Under the decisions of this court, in order to sustain appellant's contention, words must be read into the section of which not a hint appears now.

The following words must be read into the section: "And such corporation, upon such merger and consolidation, shall, during the life of its franchise (perpetually) maintain such charge without regulation or lowering of the same, at any time, by the legislature or City Council."

But again appellant concedes that the legislature retains its right to regulate.

But appellant, denying that the city has any power to regulate from the legislature, and conceding that the leg-

islature retains the right to regulate, still maintains that it has an irrevocable contract!

Is it possible that appellant means that the old provision of the Act of 1865, as interpreted by it, and with the implications claimed by it to run with such act, are to be implied as a part of the Act of 1897, so that the court must add to that Section 11 such words as are suited to establish appellant's claim, running about as follows:

"And such corporation shall, upon such consolidation, perpetually maintain such charge without regulation of the same by any municipality, but subject at all times to regulation by the state?"

But there is no authority for vesting any contract of immunity in appellant by implication, and such course is impossible under the decisions. Moreover, granting that appellant could derive such a contract from the Act of 1897 by implication, there is still no contract for anything that can be implied from the language. There is no language from which can be implied an agreement by the legislature that no delegation of the regulating power to municipalities theretofore made and none that might be made thereafter should in any way affect the right of a company taking advantage of the act to forever exact the rate fixed by Section 11 of the act. In the absence of such language, it is respectfully submitted, no contract has been derived by appellant from the Act of 1897.

III.

The Act of 1865, it is respectfully submitted, reserves to the City of Chicago the governmental power, after the year 1875, to fix the rates for gas to be charged by appellant during the life of its charter.

It is to be noted that in construing the city's powers under the Act of 1865, the rule urged by appellant in its brief, that the city only derives such powers from an act of the legislature as are expressly given or necessarily implied, does not apply, and none of the cases cited by appellant are in point in discussing this branch of the case. This is true, because, as we have seen, the Act of 1865 is a grant to this public service corporation, and all doubts must be construed against the corporation, all intendments taken most favorably for the public and all ambiguity interpreted in such manner as to vest power in the public.

This is so, because after 1875 the city takes the place of the state, the legislature expressly reserving the regulating power to the city after that date.

The act is, first and foremost, a grant to the corporation; the city's right is not a grant, it is a reservation of the governmental power of check on the *quasi* public corporation. In the same way that appellant must show its pretended contract by explicit and unmistakable language, so in interpreting this reservation of the governmental power, the language, where ambiguities arise, will be interpreted so as to vest in the city a useful and available power. A power, to use the language of this court in the Freeport Water case, which the city can employ to adjust the rates, "as justice to both parties might require at a particular time."

We believe that on no subject are the opinions of this court fuller and more explicit than in holding that in all questions of power reserved, between this class of corporations and the public (here the city), all interpretation and construction must be such as to uphold the power of the city.

The legislature has the right to fix the rates charged by those corporations serving the public, as gas companies, water companies, railroads and the like, the only limit being that, as regulated, they must be reasonable. Where the right has been reserved in the city, as in this case, the same rule prevails.

Ga. Banking Co. v. *Smith,* 128 U. S., 174.

C., B. & Q. R. R. v. *Iowa,* 94 U. S., 161.

Stone v. *Farmers Loan and Trust Co.,* 116 U. S., 307, and following cases.

San Diego Land Co. v. *National City,* 174 U. S., 739.

Covington and Lexington Turnpike Co. v. *Sandford,* 164 U. S., 578.

Budd v. *New York,* 143 U. S., 517.

Freeport Water Co. v. *Freeport City,* 180 U. S., 557. and following cases.

Barbier v. *Connolly,* 113 U. S., 27.

Logansport Gas Co. v. *City of Peru,* 89 Fed. Rep., 185.

Ruggles v. *Illinois,* 108 U. S., 526.

Lake Shore v. *Smith,* 173 U. S., 684.

Wisconsin, M. & P. R. R. v. *Jacobson,* 179 U. S., 287.

Smyth v. *Ames,* 169 U. S., 466.

Reagan v. *Farmers L. & T. Co.,* 154 U. S., 362, and those following.

Spring Valley Water Works v. *Scottler,* 110 U. S., 347.

Chicago & Gd. Trunk Ry. v. *Wellman,* 143 U. S., 339.

St. Louis & San Francisco Ry. Co. v. *Gill,* 156 U. S., 652.

Brass v. *Stoeser,* 153 U. S., 391.

We have quoted the language of many of these cases under the first head of our argument, and each case is conclusive of the city's reserved right to regulate rates charged by appellant.

In all the cases cited by us the language of the various acts is much clearer for the meaning claimed by appellant than is that in the Act of 1865, yet in each the right in the city is upheld, and the most that is ever said as to the rates specifically named in the act is that it is the mere expression of the legislature or city council that the specific rate named is for the time being reasonable.

It is invariably held that the fixing of the particular rate, as in this act, is never an exhaustion of the power to regulate and never a limitation against future lowering when the same becomes necessary to secure a reasonable rate.

The same cases are equally uniform that a grant to a public service corporation, reserving such power in the city, must be interpreted so as to make the power available to secure just rates at all times.

To hold that we do not obtain by the act a full and untrammeled power of regulation is to overlook entirely the language of Section 3.

The legislature having removed the limitations of 1855, first vests in the city, in direct language, the right to fix rates. Then comes the ambiguous clause.

To deny the city's full power is:

First. To defeat the clear reservation of power first given by an interpretation of the doubtful clause inimical to public rights.

Second. The court must add to the actual language used as follows: "either before or after the expiration of said ten years, and at no time will the right of regulation of rates to be charged by gas companies be delegated to the cities, villages and towns of this state."

Third. The court must overlook the meaning necessarily implied by appellant's interpretation: "but such power of regulation shall not permit the common council to lower such price to a reasonable rate."

The first clause of the act needs no interpretation. It is:

"But ten years after the passage of this act the common council of the City of Chicago MAY, *by resolution or ordinance,* REGULATE THE PRICES *charged by said company for gas.*"

The court will not construe the next clause so that the intention of the legislature will be defeated and the plain reservation be made void.

The next clause reads:

"But said common council of the City of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

Here is doubtful language and appellant demands that it be resolved in favor of the company and against the public.

The first clause, complete in itself, must stand, and this last clause must be so construed as to carry out the clearly expressed intention of the legislature.

The proper construction must be given it so that it reads:

"But said common council of the City of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than [is reasonable, which at present is] three dollars per thousand feet."

This preserves the right in the public and carries out the intention of the legislature, and at the same time does full justice to the company. This charter is perpetual, and it would be an unconscionable construction that would disregard the tendency to a larger recognition of public rights as against those aggressive corporations, and would, by a unique interpretation of a doubtful phrase, hold that the state had forever found itself not to put the regulation of civic rates into civic hands.

This is the more manifest when it is remembered that at the time in question the dollars prescribed were legal tender dollars, *token dollars.*

The value of the token dollar of that date was not to exceed forty cents, the Civil War was still in progress.

In actual value, the act fixed the reasonable rate at that time at $1.20 per thousand feet.

This construction, which we believe to be the right one, is exactly in line with the decisions of the United States Supreme Court already stated.

Thus, in the Danville case, 180 U. S., 619, the charter fixed certain rates and provided that such rates should be paid continuously during the life of the charter, and that such rates were an "inducement to said water company to accept the provisions of this ordinance and *contract.*" Notwithstanding this language, the court finds the subsequent ordinance, materially lowering these rates, to be valid and binding.

The first rate, expressed, is merely the statement by the public that that rate is at the time reasonable. The power to regulate remains, to be exercised at any time it may be required to secure justice.

It is notable in this connection that appellant nowhere alleges either in its pleadings, nor by the argument of its counsel, that the rate of seventy-five cents is not a reasonable and just price to be charged.

It is arguing for the right to a perpetual monopoly, based on implications arising by technical and ~~immaterial~~ tenuous interpretation.

When these various charters construed by this court are read under the court's decision, the same or similar words are interpolated in each case, as appear in brackets in this second clause in our case. The court reads them in. In all these cases the court adheres to the doctrine that the rate expressly fixed in the ordinance or charter [or in the case at bar, in the act of 1865], is not an exhaustion of the power to fix the rate, it is merely the statement of the opinion of the Legislature that at the time the charter is given, the expressed rate is reasonable.

The last clause of this Section 3 can be read in three ways:

First: In the manner we argue for, which is to make the power reasonable, valid and something that the City Council could utilize for the benefit of all concerned and to secure just rates.

Second: It can be read, as counsel for appellant reads it, to mean that the Legislature agrees to protect the company from the City Council, and agrees that, for all time, the City Council shall get no power from future Legis-

latures which will enable the City Council to lower the price below three dollars.

This construction is contrary to all the principles governing legislative grants, because the Legislature cannot tie up the discretion of future Legislatures perpetually. It must be remembered that this is not a case where the Legislature has given a contract for a stipulated rate, as in the 115 U S., the New Orleans case. Here, no price is fixed at all, but it is claimed the Legislature contracts that no future Legislature will delegate the fixing of rates to the municipality.

The Circuit Court, in its opinion, stated that such a construction was inadmissible, that if such was the intention of the Legislature, the provison would last only until the next meeting of that body.

This must be so, particularly when it is conceded that the Legislature retains its power, unimpaired. If such is the correct reading of the clause it must fall, as being against public policy, leaving the first clause intact, that, after ten years, the City Council should regulate the price of gas.

Counsel, in making the concession that the Legislature retains the right of regulation, puts himself in no better position. He surrenders the *prima facie* reading of the last clause, and there is nothing left for him, but to interpolate words in a manner impossible.

He makes the clause read:

"But said common council of the City of Chicago is not hereby authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

By this construction the clause is entirely changed and meaning changed.

The clause, as written, does not say that the City Council "is not 'hereby' authorized."

It does not recite that the city's power is limited by itself—by the provisions in the clause and act itself. The city is not limited at all by the clause itself. The recital of the clause as actually passed is to an entirely different effect.

The clause is *in the future tense.*

To get this third construction, the word "hereby" is essential; it is indispensable, because unless the act itself fixes by clear and unmistakable language the immunity, there is none, the legislature cannot provide what the discretion of any future legislature may be.

In order to reach this third construction, the words "shall, in no event, be," must be gotten rid of.

These words fix nothing as of the present.

This meaning cannot be read into the act. Such meaning, to be reached even by implication, requires an absolute change of the language of the act.

The Act of 1897.

The city having the right to regulate rates under the Act of 1865, when the Peoples' Gas Company voluntarily took advantage of the Consolidation Act of 1897, and came under the general law, that power of the city was not lost.

There is nothing in the Act of 1897, that provides that any right of regulation in the city over any gas company which takes advantage of its provisions, is lost by such merger or consolidation.

Therefore, even if the city does not have the right to regulate under the Cities and Villages Act, it would con-

tinue to have the same right reserved to it by the act of 1865, after the Peoples' Company consolidated under the 1897 Act.

In this connection, we again call attention to appellant's difficulty in making the shift from its alleged contract for three dollars to the supposed new one of one dollar.

Counsel derives his claim to the one by the supposed agreement of the legislature that it would, *at no time* (words interpolated), empower the city to lower the price below three dollars.

He then takes this alleged agreement as to three dollars and tacks it onto the one dollar charged by the old company prior to the consolidation, and says, the legislature now agrees in some manner that it will never permit the city to lower the price below one dollar. But he must take the tail with the hide.

The old act provides:

"But ten years after the passage of this act the Common Council of the City of Chicago MAY, *by resolution or ordinance,* REGULATE THE PRICES *charged by said company for gas.*"

Appellant derives a contract, if at all, only from its old act, so it must retain in this one-dollar contract the first part of the old contract. He then interpolates "One" in the place of "Three," in the last clause, and the act is done.

But, by what "strict and explicit language" does the "One" get in the old contract?

Moreover, counsel admits that under no circumstances can his company ever go above one dollar, under Section 11 of the Consolidation Act.

He then maintains, as before, that the city is given the right to regulate, but will never be permitted to regulate above the price of one dollar.

But under Section 11, no higher price than one dollar being possible, appellant must gravely read its contract that the city is given a right to regulate a price which (under Section 11), can never be charged.

But this court will never so construe an act reserving a power of regulation as to make it a nullity—so appellant's claim of a contract as to one dollar by virtue of any grant under the Act of 1865, falls.

Its claim under the Act of 1897 also falls, because there is no such language in the act as is required by this court providing explicitly that this price fixed by the preceding years' charge shall forever remain a contract rate.

Under either act, appellant's claim of a contract fails.

This very situation is the strongest argument that the interpretation claimed by the city must be put upon the Act of 1865. Section three therein must be interpreted as an available power on the city, available perpetually as the franchise is perpetual.

It is respectfully insisted that the city still has the power to regulate gas rates under the Act of 1865, that it had that power in October, 1900, and that the exercise of that power in passing the seventy-five-cent ordinance complained of was a valid exercise thereof.

IN

THE CITY COUNCIL HAS THE RIGHT TO REGULATE UNDER THE CITIES AND VILLAGES ACT.

The right is derived from the last part of clause *thirteenth*, Sec. 63, Art. V, of the Cities and Villages Act, passed in 1872. That clause reads as follows:

The City Council shall have the power:

> "THIRTEENTH. To regulate the openings therein [in its streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights. PROVIDED, HOWEVER, that any company heretofore organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

It is obvious that the first sentence of clause thirteen stands by itself, and it is complete in itself.

It reads as follows:

> "To regulate the openings therein (in streets) for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights."

It has to do with openings in the streets and enumerates every kind of hole in the street that the legislator of that time was cognizant of.

The sentence is complete in itself. It gives the city complete control of the subject of openings in streets.

As we shall see later that was all there was of clause *thirteenth,* as the clause originally stood.

The rest of the clause must be read separately:

> "Provided, however, that any company heretofore organized under the general laws of this state or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

It does not deal with holes in the streets, it is an entirely separate provison.

It should have been a separate clause, and we will call it *sub-thirteenth.*

It is a general provision, giving City Councils the right to regulate gas companies in all their public relations and in their relations to the citizens of the place.

We submit that the language of the section is so broad as to include regulation of all the gas company's public relations, and, therefore, includes the regulation of gas rates.

To get the clear meaning of this clause we will analyze it;

"Provided, however, that any company * * * shall have the right, by the consent of the Common Council (subject to existing rights), to erect gas factories and lay down pipes in the streets or alleys of any city or village in this state."

We stop there because the power is complete—it provides for competition, any body of men or corporation can,

subject to existing rights, and subject to the consent of the City Council, start a gas company, instal a plant and lay pipes.

Nothing more need be added because the consent of the City Council includes the conditions as to opening the streets, etc.

And clause *thirteenth* already has given the city the right to regulate holes in the street.

But there is still another clause.

It reads:

"Subject to such regulations as such city may by ordinance impose."

It is obvious that this power delegated to the city is something different from the power given by clause *thirteenth.*

The court will not hold that the Legislature simply repeats itself, that the last clause is useless and without force or meaning.

Appellant argues that the last clause simply refers to the regulation of making holes in the streets.

But that is provided for by *thirteenth.*

Appellant cannot argue that the clause refers to the terms to be imposed when the city gives its consent to the gas company to start in business, the preceding sentence provides for the consent of the city.

This last clause is intended by the Legislature to delegate to the city the general power to regulate gas companies that come under the general law, in their relations to the public and to the inhabitants of the city, including the power to regulate the rates to be charged the inhabitants for the use of gas.

We submit that there can be no escape from this conclusion.

The court will not construe it to make the Legislature ridiculous.

It is no repetition, it must be held to give the city the general power to regulate.

The greater includes the less, and the general power to regulate must include the particular branch of regulation over rates.

The Supreme Court has construed a similar statute in the Water Cases and has held that general language, almost identical with this in clause *sub-thirteenth*, found in Section 9 of the Corporation Act, includes the particular power to regulate the rate charged.

Section 9 of the Corporation Act reads:

"The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act."

In the Freeport water case, 180 U. S., 587, the court construes this section and says it includes the reservation of the right to fix rates.

In that case, the water company's counsel attempted to put a narrow meaning on the term "regulations," as is sought to be done here by appellant, but the court rejected that interpretation and applied the broad meaning to the word, as we claim for it here.

The court says in regard to this word "regulations" in Section 9, on page 596:

"The Supreme Court of the state in passing on the case not only considered the acts of the 9th and 10th of

April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and it was held that the act 'must be regarded as entering into and forming part of the charter' of the plaintiff. The statute reserves to the General Assembly the power to prescribe in the government of corporations 'such regulations and provisions as it may deem advisable.' The language is comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it.

The Supreme Court of the state has construed it to be of greater import than the usual reservation of the power to alter or amend the charters of corporations. The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business arrangement of the corporation itself," but regulate "those classes of acts which control the relations existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the power of a corporation."

We think the construction is too narrow, the statute made no distinction between the internal and the external business of corporations—between their relations to stockholders and their relations to third persons. Such are but special exertions of power which the Legislature possesses."

But the use of the word "regulations," is as broad and comprehensive in this clause *sub-thirteenth*. We have seen that it cannot be construed to be a mere foolish repetition, referring to power over making holes. The

rights of these gas companies are: "Subject to such regulations as any such city * * * may by ordinance impose."

The Supreme Court says: "It is difficult to conceive what objects of legislation are not covered by it." The language is identical in each act.

The court says, that that Section 9 must be read into every charter of every corporation which comes under the general law.

It must be read into the charter of appellant, because it has come under the general laws by taking advantage of the Act of 1897.

The bill shows that appellant is a consolidated or merged company, formed by the old People's Gas, Light and Coke Company, joining with others under the Act of 1897.

By the provisions of that act, the merging or consolidating companies come under the general law.

For the same reason that Section 9 must be read into appellant's charter, under this clause *sub-thirteenth*, it must be held that the City Council has the right to pass and enforce this seventy-five-cent gas ordinance. Even if it had not such right under the Act of 1865.

The court must not only disregard its own decisions in construing precisely similar language, in a statute passed at the same session of the Legislature as this one was, but it must close its eyes to the common sense of the very section itself, in denying this reasonable construction, and finding for appellant, that under clause *sub-thirteenth*, the general power "subject to regulation," only has to do with regulating holes in streets.

Appellant is fighting for a monopoly—it claims the

right to charge an onerous rate perpetually. It does not claim that the seventy-five-cent rate is unreasonable, it must be held on the face of the pleadings that the rate of seventy-five cents is reasonable.

It is, therefore, in the position of demanding here that the Act of 1865 shall be construed against the public and in favor of a public service corporation in order to hold up an unreasonable rate perpetually, and that for the same laudable purpose the Cities and Villages Act shall be given a strained interpretation in the face of the decisions of the Supreme Court.

Facts Surrounding Passage of Cities and Villages Act.

Again following the views of this court, expressed in the Potomac Telephone case, in 186 U. S., 238, we must regard with value the facts and circumstances surrounding the passage of this Cities and Villages Act.

In the legislative session of 1871-1872 (which the learned Chief Justice will remember as the Fire Legislature, with John N. Jewett, William H. King, "Jim" Root and many other notables among the members) this act was introduced and passed as Senate Bill No. 178.

From the journal of the senate, on page 240, it appears that the bill was introduced on February 23, 1871, by Mr. Edsall.

On page 416 of the journal it appears that on March 22, 1871, Mr. Epler offered the following amendment to Senate Bill 187. Amend Subdivision 13, Section 1, Article V, by adding:

> "Provided, however, that any company heretofore organized, or which may be hereafter organized, under the general laws of this state, or any associa-

tion of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas, to supply cities or towns, or the inhabitants thereof, with the same, shall have the right (subject to the existing rights) to erect gas factories and lay down pipes in the streets or alleys of any city or town in this state (having a population of not less than five thousand inhabitants), subject to such sanitary regulations as any such city or town may impose, through its board of health."

It will be seen that this is the very proviso, as amended by Mr. John N. Jewett, that is now before the court.

By page 417 it appears that on March 22, 1871:

> Mr. Beveridge offered the following amendment to the amendment offered by Mr. Epler, which was lost:
>
> Amend amendment by making its provisions only applicable to cities and villages organized under this act.

It further appears on the same page that on the same day, the question being the adoption of the amendment to Senate Bill No. 178, offered by Mr. Epler, Mr. John N. Jewett offered the following amendments, which were adopted:

> Strike out the words, "having a population of not less than five thousand." Also, strike out the word "sanitary." Also, strike out the words, "through its board of health," and add the words, "by ordinance," before the word "impose," in the last line.

Mr. Epler's amendment, as amended, was then adopted.

Mr. Reddick moved the previous question, the question being upon ordering the previous question, and the yeas and nays being demanded, it was decided in the affirmative, as follows: Yeas, 27; nays, 13.)

On page 28, second volume, it is shown that on No-

vember 16, 1871, on motion of Mr. Underwood, Senate Bill No. 178, for "An act for the incorporation of cities and villages," was taken up and referred to the committee on municipalities.

It further appears, on pages 226 and 227, second volume, of the journal, that on December 20, 1871, this bill, 178, passed the senate, and, on page 898 of the journal, that on April 8, 1872, the bill was duly enrolled.

On page 161 of the Senate journal it appears that on January 31, 1871, the same Mr. Epler who subsequently added this *sub-thirteenth* clause to the Cities and Villages Act, introduced Senate Bill No. 97, for "An act in relation to the establishment of gas companies."

It further appears, on page 336 of the journal, that on March 9, 1871, Mr. Epler, from the committee on judiciary, to which was referred Senate Bill No. 97, for "An act in relation to the establishment of gas companies," reported the same back, and recommended its passage.

On page 567 it appears that on April 13, 1871, this Senate Bill 97 was read a second time, and that thereupon Mr. John N. Jewett offered the following amendment:

> "Amend Section 1, as follows: 'After the word 'shall,' at the end of the fifth line, insert the words 'by and with the consent of the corporate authorities of such cities and towns.' Also, strike out the word 'sanitary,' in the eighth line, and the words 'through its board of health,' in the ninth line, and insert the words 'by ordinance' before the word 'impose,' in the ninth line."

Mr. Edsall offered the following amendment to the amendment:

> "Add to Section 1: 'Provided, that such regulations shall be uniform and operate equally upon all gas companies who desire to supply any such city

or town with illuminating gas, and no discrimination shall be made in favor of or against any particular company.' "

The bill and amendments were referred to the committee on judiciary.

From page 38, second volume, of the journal, it appears that on November 17, 1871, Senate Bill No. 97, for "An act in relation to the establishment of gas companies," was taken up, read at large a second time and referred to the committee on municipalities.

It further appears from the house journal of the same session, on page 288, that on February 16, 1871, a bill, House Bill No. 190, for an act in relation to the establishment of gas companies, was introduced, and, on page 350, it is shown that on February 16th the committee on corporations recommended that it be not passed.

On page 384 it appears that on February 22d House Bill No. 333, for an act in relation to gas companies was introduced, and, on page 605, it is shown that on March 16th the committee on corporations recommended that it do not pass.

It is earnestly submitted that this short history renders it conclusive that this proviso in clause *thirteenth* was intended by the legislature to give something more to the city than the mere right to regulate holes in the street, as claimed by appellant. It was intended to give it governmental power.

The other language in this act, as we have seen, covers all other lines of control.

The only way that this last clause, "subject to such regulations as any such city or village may by ordinance impose," can be made effective and available (and this

court always construes acts in regard to public rights so that they will not be useless) is to follow the court's decision in the Freeport water case, 180 U. S., and interpret the proviso, clause *sub-thirteenth*, as a going section of the act, giving the city the right to regulate rates.

The progress of the act shows this clearly.

The Cities and Villages Act was introduced on February 23, 1871. On March 22, 1871, Mr. Epler proposed that clause *thirteenth* be amended by adding this clause *sub-thirteenth*, but it was then in a weak and comparatively helpless guise. It remained for Mr. John N. Jewett, whom the court knows to be of the most undoubted standing, both as man, citizen and lawyer, to so amend the proviso that it became an available and regulation-giving instrument in the hands of the city.

As originally offered the right of the city was confined to "such sanitary regulations" as should be imposed by the Board of Health.

As changed by Mr. Jewett and passed, the language reserving the limited power in the city was changed, giving the city the unlimited and general power recognized by this court in the Freeport case.

It was changed to read: "Subject to such regulations as any such city or town may, by ordinance, impose."

It was certainly intended to reserve to the city every regulation that can naturally be imposed "by ordinance." The regulation of rates comes under that head.

But this interpretation, already certain, becomes more so when it appears that this proviso, this clause *sub-thirteenth*, is really Senate Bill 97.

That was a bill applying to gas companies only, and was introduced on January 31, 1871, by Mr. Epler. It was referred to his committee, the Judiciary Committee.

On April 13, 1871, Mr. John N. Jewett proposed certain amendments and by comparing such amendments with those already proposed by him to this clause *sub-thirteenth* on March 22nd, it is seen that Section One of Bill 97 was identical with the present clause *sub-thirteenth.*

In other words, this clause *sub-thirteenth,* was intended by the legislature to take the place of a separate act, giving cities a right to regulate the price of gas.

We submit that there can be no escape from this conclusion, because, if passed as Bill 97, clause *sub-thirteenth* would appear, not as a proviso, as it is in its present form, but as a separate act.

It would then read:

"Any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities and villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

Reading this section with Section 9 of the corporation act (which was passed at the same term of the Legislature), we see that the language, so far as giving power to the city is concerned, is identical.

This court, as we have shown, has already decided in the Freeport case, 180 U. S., that the language of Section 9 includes the right to regulate rates.

We submit that the same language here should be given the same force.

These conclusions are more certain when it is remembered that the cities and villages act was re-referred to the committee on municipalities on November 16, 1871, and that the gas bill, No. 97, was, on November 17, 1871, referred to the same municipalities committee, although up to that time it had always been referred to, and in the hands of, the judiciary committee. These ear-marks cannot be mistaken; the senate sent the separate gas act to the municipalities committee, in order that it might be incorporated into that act.

It was incorporated therein as this clause *sub-thirteenth*, and it must be given the same effect as if it were a separate act.

Appellant argues that this clause must be limited by the context of clause *thirteenth*, but the reading of *sub-thirteenth* shows that to be an untenable position, and the history of its passage shows that it must be interpreted as a separate act.

It is submitted, however, that the intention of the legislature was clear that they were giving the city a rate-regulating power by the clause *sub-thirteenth*. The amendment proposed by Mr. Edsall to this clause when it was still senate bill 97 shows that the legislature well knew they were giving the city the rate-regulating power. The amendment to Mr. Jewett's was that "such regulations shall be uniform and operate equally" on all companies in the city and that "no discrimination shall be made in favor of or against any particular company."

This amendment by Mr. Edsall would not have been thought of by him if it had not been the known intent of the legislature that this clause, *sub-thirteenth*, should give the city affirmative and available power, the power to regu-

late rates. If the only object of the proposed clause had been to repeat the already fully-expressed power to control the making of holes in streets, Mr. Edsall would not have proposed his amendment.

It was an important enactment, giving governmental authority to the cities, and careful supervision was given it.

The fact that Mr. Edsall's amendment was not adopted cannot be urged against our interpretation. The amendment was not needed. The law would impress upon the act, without positive language to that effect, that the application of the act must be uniform.

At the same session of the legislature other separate gas bills were introduced and defeated, from which it may be argued that the agents of the old People's Company were so active and successful that the separate measure, bill No. 97, could not pass, and that the public-spirited senators, headed by Mr. Jewett, forced the passage of this act, so important to the inhabitants of cities throughout the State, by tacking it to the cities, villages, and towns act, which the pro-gas men dared not defeat.

The passage of this bill 178, the cities act, could not be delayed, because this was the first session of the legislature under the constitution of 1870, and these general acts were very essential, the legislature being prohibited by the constitution from passing special acts on any subject.

Appellant in its brief seems to take the position that this act, clause *sub-thirteenth*, if valid, would only apply to companies incorporated under the general law, but the reading of the act shows the contrary to be true.

Clause *sub-thirteenth* provides "that any company heretofore organized under the general laws of this State, or any association of persons organized or which may be hereafter organized" for the manufacture, etc., of gas. This language

is certainly broad enough to include the appellant company and the old People's Company.

Since the adoption of the constitution of 1870, and the passage of the corporation act of 1872, it is common to make a distinction between corporations under the general law (of 1872) and corporations created by special charter (granted before the constitution of 1870).

But this meaning cannot be taken of the language "general laws" in clause *sub-thirteenth*, because no corporation could be created under the "general law" prior to the passage of this cities act, because the corporation act and the cities act were both creations of the legislature of 1871–'2.

Obviously the expression can be taken only as meaning any corporation theretofore organized by the legislature of Illinois in the regular method of granting charters. The language "any association of persons organized" for the purpose of manufacturing, etc., gas, would also include the old People's Company.

The history of the passage of this act (*sub-thirteenth*) further shows that it was intended to be general in its application.

It appears by the Senate Journal, as shown on page 44 of our brief, that one Mr. Beckwith proposed an amendment providing that this clause, *sub-thirteenth*, should apply only to cities incorporated under the act then in process of formation, under senate bill 178, but the amendment was promptly voted down. This not only shows that the act was to be general in its application as to companies as well as to cities, but also is further conclusive evidence that the act was intended to give the rate-giving power; because if it only applied to regulating holes in the streets, why would amendments be offered that it should not apply to cities incorporated prior to 1872?

Was not some timid or over-zealous friend of gas attempting thus to protect the old People's Company and others from rate regulation under the act?

Such friends had tacked the ambiguous last clause upon section 3 of the act of 1865, hoping thereby in a humble way to "help out." Was not this amendment a continuation of the same zeal?

The cases of City of Joplin *v.* Southwest Missouri Co., decided at this term of court and now published in the advance sheets of the reports as of the 191 U. S., 151, and of Owensboro *v.* Owensboro Waterworks Co., published as of the 191 U. S., 358, are, we submit, conclusive of the case at bar, not only on the point that appellant has no contract, but also on the point that the city has the power of regulation both under the act of 1865 and under the cities and villages act of 1872, this clause *sub-thirteenth*.

Thus, in the Joplin case, the court's reasoning applies to our case, and the court, passing on the company's position, say that if correct it would leave the city with "a useless potentiality."

So here appellant admits the right of the city to regulate rates, but only above the sum of three dollars under the act of 1865, and above the sum of one dollar under the act of 1897. Truly "a useless potentiality." And here, as there, the court will reject such an interpretation of the ambiguous language and such a claim of immunity, founded on implication.

In that case, under the statutes of Missouri, the city could contract with private parties to furnish light or could construct a plant of its own.

Appellant granted a franchise to the appellee company, and during the life of the franchise began the construction of a plant of its own.

The lower court enjoined the city on the ground that the construction of the city's works was an impairment of appellee's contract, and the co[illegible]reversed the decree upon the ground that there was no express language in the statute or in the city's ordinance that the city could not elect to construct its own works, notwithstanding the previous franchise.

The court says:

> "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which would give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot the city is left with a useless potentiality while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

In Owensboro *v.* Owensboro Waterworks Co., 191 U. S., 358, the ordinance was expressed to be binding upon the city as a contract, and "the measure of the rights and liabilities of the city and of the water company."

The city subsequently lowered the rates, and appellee urged:

1. That the lowering of the rates impaired their contract.

2. That the city had no power to fix rates.

The court decides the issues in favor of the city on the strength of the Stone cases, in the 116th U. S., and the Water cases, in the 180th U. S.

We invoke the same reasoning and the application of the same principles to the case at bar in favor of the same public right.

Appellant argues that this clause *sub-thirteenth* is only a proviso and a part of clause *thirteenth*, and that the powers given to the city in the proviso must be limited by the context—that is, that no wider powers are given than are embraced in the subject-matter of clause *thirteenth*, to-wit, holes in the streets. But on the face of the section, this conclusion cannot be a valid one. This court has passed on the force of statutory enactments, in form of provisos, and in cases like this clause *sub-thirteenth* interpreted them as independent acts, conferring power wider than that treated of in the text of the original act.

Georgia Banking Co. *v.* Smith, 128 U. S., 174.

Chesapeake and Potomac Tel. Co. *v.* Manning, 186 U. S., 238.

V.

Even if the original People's Company enjoyed, under the act of 1865, the immunity from regulation claimed by it, nevertheless when it went into the consolidated company, under the act of 1897, that immunity was lost.

The act of 1897 was passed for the purpose of evading the force of the opinion of the supreme court of Illinois in the Gas Trust case, 130 Illinois, referred to in another place.

A previous attempt to consolidate by these same companies, or some of them, into what was called the Chicago Gas Trust Company was declared illegal, and the legislature was asked to pass this act of 1897 to legalize the same thing.

The language of the act legalizes a sale, lease, or merger, and the effect of the act is made the same, whatever form the consolidating companies choose to take.

In this case counsel concede that the form pursued was a merger or consolidation.

After, in various sections, directing the methods to be pursued, the legislature, in section 9 of the act, provides what effect the consolidation shall have on the constituent companies, and how the obligations of those companies shall be met by the new consolidated company.

It will be noted that all the constituent companies are affected alike by going into the merger; that there is no difference resulting whether one particular company or another is chosen as the one whose name is to survive.

Eliminating the language bringing in the purchasing or leasing companies, section 9 reads:

> "§ 9. * * * *Any consolidated corporation*, as authorized by section 2, shall be subject to and shall perform for each of the companies so entering into said agreement or agreements, the legal obligations *now resting upon each of them*, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by * * * such consolidated corporation, shall be held and considered as the performance by each of the respective companies so * * * consolidating, of the legal obligations theretofore resting upon each of them respectively: *Provided, however*, that nothing in this act shall be construed as extinguishing *said companies* entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses, or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever exercised or enjoyed by any of them may be necessary for the protection of their respective creditors or

> mortgagees, or any of them; the *separate exercise* of their respective powers, and the *separate enjoyment* of their *separate* privileges and *immunities being suspended* until the *protection of such creditors* or *mortgagees* shall require their resumption, when *such suspension shall cease*, so far as, and *for such time as*, the protection of such creditors or mortgagees may require."

The language is specific, we submit, that the acceptance of the terms of the act has the same effect on all the constituent companies, no matter which one survives in name. Appellant argues that the old People's Company remains intact because its name is used in the merger, and consequently that its pretended immunity survives, but the consolidated company would be the same entity it is now and have the same powers (and none others) if the name of any of the other constituent companies (the Chicago's, for instance) had been retained. There is no difference made in section 9 between any of the constituent companies. All are on the same basis, whether the name of the one or the other is used for convenience. Section 4 has to do with the manner in which the merger or consolidation shall be brought about, and in so doing, as to the merger, provides that the directors "* * * of the companies proposing to consolidate and merge into *a single corporation*" shall take certain steps.

Then section 9 provides that "any consolidated corporation" shall perform the legal obligations of the constituent companies, the disappearing companies being absolutely on the same basis with that one whose name is retained in the consolidated company.

The section goes on to provide that the performance by "such consolidated company" shall be held and considered

as the performance by each of the respective companies "so consolidating."

It is impossible to say after this language that any one company remains identical with the old company "so consolidating," and the other companies "so consolidating" are the only ones disappearing.

All constituent companies are on the same basis. The consolidated company is identical with neither of them. It is the successor of each. It derives its life entirely from the act of 1897.

Without that act it could not come into being, and under section 9 of that act it is shorn of the immunities of each and all of the constituent companies.

To read section 9 as appellant would have it read, so as to preserve the immunities of the old People's Company, would be to change the language absolutely. Under the decisions of this court, in order to vest a successor or consolidated company with the immunity of one of the constituent companies, exact language to that effect must appear in the act. There is none in this act.

The section reads: "*Provided, however*, That nothing in this act shall be construed as extinguishing said companies" entering into the consolidation.

Here no difference between them is made by "exact language." "Said companies" refers back to "each of the respective companies." All are on the same basis. The immunities of the company whose name remains with the consolidated company are on the same basis as those of the company whose name is dropped.

They are all the immunities of "said companies."

Not only is the language of the act not susceptible of being construed as retaining the consolidated People's Com-

pany identical with the original People's Company, but such an interpretation would give an unconscionable opportunity for fraud in the manipulation of these consolidations, as we point out elsewhere.

This court will not so construe the act of 1897 as to make it an engine for fraud.

It will be construed as enabling rival companies to unite and do away with duplicate expenses, but not as enabling conscienceless schemers to use one high-charging corporation to combine with others limited by their charters to lower rates, and so by combination to make an advance in rates which by law the constituent company was forbidden to do.

It makes no difference that the old People's Company may have voluntarily reduced its rates, so that the rates of all the constituent companies had become practically the same, the act must be construed to fit all cases and that interpretation reached which will protect public rights at all events. The interpretation must be the same as if the old People's Company had continued to charge the three dollars up to the date of consolidation. The principle would remain the same. Section 9 provides explicitly that all immunities of all the constituent companies would be lost when they go into the consolidation.

It says the act shall not be construed as extinguishing the "respective franchises, licenses or privileges" of "said companies," but "they ('said companies,' the old People's as well as the old Chicago Company and the rest) shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any * * * *privilege or immunity* ever * * * enjoyed by *any of them* may be necessary for the protection of their respective creditors or mortgagees * * * :"

But the section goes on to say that the exercise of "*their separate* privileges and *immunities* shall be suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require."

In other words, *the merged or consolidated company has no immunity.*

The old constituent companies resume their *separate immunities* when the protection of the separate creditors of the old company requires such resumption, such immunity being in suspense in the meantime.

The statute expressly giving them the power to resume their immunities temporarily for an express purpose, they are forever lost for any other purpose. As it is expressly provided they shall be resumed to protect original creditors of the constituent company, they cannot be resumed to protect creditors of the merged company.

But if this were not the effect of the statute by necessary implication, the language is express that, except where resumed for this explicit purpose, the immunity of the old company is *suspended*, to be brought into life only for this particular purpose.

In no part of the act is there any provision creating in express language or by necessary implication any immunity in its creature, the consolidated company.

The only immunity claimed to exist in any of the old charters is the immunity from regulation of charges by the city below a certain price.

But we do not need the language of section 9 to uphold our contention.

Appellant is insistent that the consolidated company is not a *new* company. It makes no difference whether it be

called *new* or not. It is certain that it exists only by virtue of coming under the act of 1897, and derives its corporate existence only by virtue of that act, whether the consolidation or merger now before the court makes a new company or not. It is certain that the consolidated company, being the creature of the act of 1897, must derive any immunity from regulation by the express and clear language of the act itself.

Georgia Banking Co. v. Smith, 128 U. S., 174, and cases before cited.

Furthermore, if the pretended immunity claimed to be derived from the act of 1865 were not wiped out by the terms of section 9, nevertheless the Supreme Court of the United States has settled forever the principle that immunities from public regulation enjoyed by constituent companies do not go to consolidated companies or successor companies, or to companies that succeed by purchase, assignment, foreclosure, or any other form of transfer, except by explicit language.

Such an immunity is personal to the original corporation and does not pass.

Unless there is express language to the contrary in the original charter or in the statute permitting the merger, etc., immunities belonging to the old company do not pass by sale, assignment, foreclosure, merger, etc.

Memphis, etc., R. R. v. Commissioners, 112 U. S., 609.

Wilson v. Garver, 103 U. S., 417.

Chesapeake & Ohio R. R. v. Miller, 114 U. S., 176, reading on pages 184 and 186.

Morgan v. Louisiana, 93 U. S., 217.

Dorr v. Beidleman, 125 U. S., 689.

R. R. Co. v. Maine, 96 U. S., 499.

St. Louis, etc., R. R. v. Berry, 113 U. S., 465.
Keokuk, etc., Ry. v. Missouri, 152 U. S., 301.
Hoge v. R. R. Co., 99 U. S., 354–'5.
Shields v. Ohio, 95 U. S., 323.
R. R. Co. v. Georgia, 98 U. S., 359–'62.
L. & N. R. R. v. Palmer, 109 U. S., 244.
Norfolk & W. R. R. v. Pendleton, 156 U. S., 667.
St. L. & San Francisco Ry. Co. v. Gill, 156 U. S., 649.
Covington Turnpike Co. v. Sanford, 164 U. S., 586–'7.
Yazoo & Miss. V. Ry. Co. v. Adams, 180 U. S., 1.

The decisions in some cases that, under the language of some statutes permitting consolidation, there was no new corporation, that the old corporations continued and the immunities of each old company continued to be enjoyed in the *territory only* of the old company, do not apply here.

First. Because, under the language of the act of 1897, the consolidated company is the creature of the act alone, and is not the same company as either of the constituent companies, and

Second. Because, as we have seen, the language of our statute expressly provides that the immunities of the constituent companies shall cease, except when temporarily necessary for an express narrow purpose.

On this general principle the court says, in *R. R. Co. v. Georgia*, 98 U. S., reading on page 364:

> "What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only

its being, but its powers, its franchises and immunities, are grants of the legislature which gave it its existence.

"If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany and Gulf Railroad Company went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidated act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy.

"It necessarily follows that the new company held the rights granted to it under and subject to the law as it was, when the new charter was granted. And the Code of the State, which came in force on the 1st of January, 1863, before the charter was granted, contained the following provision:

"'SEC. 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations.'

"'SEC. 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.'

"No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the Code became, in substance, a part of the charter (*Railroad Company v. Maine*,

96 U. S., 499). It is quite too narrow a definition of the word 'franchise,' used in the statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *The Central Railroad & Banking Co. v. Georgia* (54 Ga., 401), and so it must be held now, especially in view of the statutory provision of the Code, that private corporations are subject to be changed, modified or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the State's contract with the company, and the act of 1874 was such a withdrawal."

The Supreme Court says on the general principle, in *St. Louis & San Francisco Ry. v. Gill*, 156 U. S., reading on page 656:

"The supreme court of the State, 54 Arkansas, 101, as we learn from the record in this case, was of the opinion that the power to alter and amend charters, reserved to the State in its constitution, was not parted with or controlled by the subsequent act of the legislature incorporating the railroad company and authorizing it to establish rates, and that accordingly the passage of a subsequent general law, prescribing rates, could not be deemed an infringement of a contract between the State and the company.

"We do not find it necessary to express an opinion on this view of the case, but prefer to base our judgment on another ground, which will bring us to the same result. It has been frequently decided by this

court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176)."

To the same effect is the decision in *Norfolk & W. R. R. v. Pendleton*, 156 U. S., reading on page 673. The court says:

"It may be added, perhaps unnecessarily, that even apart from the clause which in terms subjected the Atlantic, Mississippi and Ohio Railroad Company, and consequently the Norfolk and Western, as its successor, to the general law prescribing rates, that there was no clause or provision in the original charters which can be interpreted as necessarily meaning that subsequent corporations, organized under later laws, can assert a valid succession to immunities and privileges like those in question. We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon

an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris* (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176)."

In *Covington Turnpike Co. v. Sanford*, 164 U. S., 578, the Kentucky legislature conferred upon the company certain immunities as to rates to be charged. Subsequently the company was permitted to change into two companies, "each company possessing and retaining all the powers, rights, and capacities" granted to the original company. It was claimed that this language carried to the new companies the immunity from State regulation of charges. The court says, reading on page 586:

> "The act of 1834, having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent. upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded 'to all the powers, rights and capacities' granted by the act of 1834, to the original corporation. This view was properly rejected by the court of appeals of Kentucky. It was well said by Judge Pryor, speaking for that court, that 'the liability and duties owing the State and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent. the old corporation would have made upon its

stock. In fact, the old corporation was extinct, and to hold that the new corporation were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion.'

"These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan v. Louisiana*, 93 U. S., 217, without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case, *Norfolk & Western Railroad v. Pendleton*, 156 U. S., 667, 673, we had occasion to say, in harmony with repeated decisions, that 'in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to *new corporations succeeding, by consolidation or* by purchase under foreclosure, to the property and ordinary franchises of the first grantee;' and that this was a 'salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact

and express requirements of the grant construed *strictissimi juris* (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Chesapeake & Ohio Railway v. Miller*, 114 U. S., 176).'

"The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation, established by authority of law, for the construction of a public highway. It is of the highest importance that such control should remain with the State, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature, if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporations, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent. on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a State, relating to the exercise of franchises, is susceptible of two meanings, 'the one restricting and the other extending the powers of a cor-

> poration, that construction is to be adopted which works the least harm to the State' (*The Binghampton Bridges*, 3 Wall., 51, 75; *Ruggles v. Illinois*, 108 U. S., 526; *Stein v. Bienville Water Supply Company*, 141 U. S., 67, 80, 81)."

So, the act of 1897 must be construed in favor of the public, and the language of section 9, even if not explicit, must be construed as providing that all *immunities* of the constituent companies going into the consolidated company are lost, except for the express, narrow, temporary purpose enumerated.

The court, in *Yazoo & Miss. V. Ry. Co. v. Adams*, 180 U. S., p. 1, reviews many of the cases already cited, and reaches the same conclusion. Nothing therein modifies the opinion in the Covington Turnpike case. The decision simply strengthens our position. The court in the Yazoo case, reading on page 22, says:

> "Exemptions from taxation (public regulation of rates) are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature."

No such intent appears in the act of 1897, and nothing is said in the charters of the old People's Company that its immunities (if any) shall go to any successor or merged or consolidated company.

Appellant argues that these authorities are not in point in this proceeding, but we submit that there is no specific language in the act of 1897 either creating immunity in what it creates, the consolidated company, or providing that any immunity of any constituent company shall survive after the merger, either in general or simply in the territory of the constituent company originally enjoying the

immunity, and therefore the principle settled in these cases applies absolutely—that in the absence of express language the immunity is lost.

Under these decisions it is certain that *the most* the company could claim (if the language of the act did not suspend all immunities of the merged companies) is that the present People's Company retained the immunity of the old People's Company in its original territory.

But this contention is untenable for various reasons:

I. The statute expressly wipes out this, with all other immunities (except as resumed to protect the old People's Company creditors).

II. Appellant concedes that what is claimed to have been a contract is lost when the company takes advantage of the act of 1897, and sets up that a new contract is created by section 11 of that act, which makes a new rate, perpetually, for $1.00.

But this act does not expressly provide that any immunity shall remain fixed to the territory of any old company.

III. Unless otherwise expressly provided by the act of 1897, any rate charged must be uniform throughout the territory of the consolidated company.

As to the original territory of the old People's Company, if its charter, subsisting after 1865, have any exclusive territorial force after the merger, the court will read the last part of section 3:

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said gas company for gas."

This is because nothing in the language of section 11 of the act of 1897 expressly gives the *merged company* the right to charge the minimum rate called for, free from municipal control, and *no language whatever* preserves to any of the *constituent companies any immunity* in its *original territory;* and as nothing in the act deprives the city of its right of control, reserved in the company's charter of 1865, we have the first part of the last clause of section 3 of that charter remaining in full force and the last part, the old ambiguous addition, destroyed, even if it once conferred immunity.

This leaves the naked provision that the consolidated company shall not charge a higher rate than $1.00 in the first instance, and that the city can thereafter at any time regulate such rate, the limit being reasonableness.

The facts set up in appellant's bill, where the city has granted permits to the consolidated company to open streets to lay gas mains, etc., could in no event be held to be a consent of the city to any claim of immunity which the company might make.

Appellant claims that under section 11 of the act of 1897 its company derives a new contract; that under that section the company's old right to charge $3.00 is lost, and a new contract is vested in it whereby it is forever entitled to charge $1.00 free from regulation or control.

The only recital in the section as to price is as follows:

> "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger."

It is conceded for the purpose of the argument that that price is $1.00.

But there is no provision that the consolidated company shall, during the life of its charter, have the right to charge this minimum rate of the preceding year perpetually, or that no municipality shall have the right at any time during the life of the charter of the consolidated company to fix the rate to be charged at less than the minimum rate for the year preceding the consolidation.

Moreover, under the provisions of the constitution of 1870 the legislature cannot, since 1870, pass an act giving any class of corporations immunity from public control.

By article 2, section 14, the constitution provides:

> "No * * * law * * * making any irrevocable grant of special privileges or immunities shall be passed."

By article 4, section 22, of the constitution, clause 22 provides that:

> "SEC. 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases; that is to say, for * * *
>
> "Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

Under these clauses section 11 cannot have the effect claimed by counsel.

APPELLANT'S BRIEF.

Appellant in its brief cites many authorities where the value of contemporaneous exposition is discussed, and claims that the opinions of certain corporation counsels of the city have been to the effect that the gas company had a contract whereby the price of gas could not be regulated by the city, etc.

Counsel have taken the pains to cite some of these opinions.

It would be most dangerous, in interpreting public powers, to give to the fugitive papers issued by public officers, on many occasions drawn to meet a temporary condition or idle question, the force of judicial decisions. It may well be that in matters of routine no danger would result.

But that the powers of public-service corporations should be determined by these fugitive papers would be a menace to public rights.

The necessities of politicians, the great political power exerted by many of such corporations in the community, the lack of publicity surrounding the issuance of such papers, all of these features and many others attending the issuance of similar papers render their use in determining questions of governmental power a most hazardous experiment. Moreover, the papers cited by appellant show on their face, most of them, the haste with which they were prepared.

We submit that the most useful purpose subserved in referring to them is to show that this power of regulation was always an agitated question in the city council.

Where questions of doubt arise as to what the law is, such expositions might be useful, where no governmental power as to these public-service corporations was involved; but we

submit that when the law is so well settled by this court on all the questions involved in this appeal, the papers relied on by counsel cannot overcome the uniform decisions of this court.

In a case arising in Chicago concerning the licensing power of the city it was urged that the city officials had pursued a certain course for a long time upon a certain theory of the law (based on opinions of the corporation counsel, if you please), and that such "contemporary exposition" should govern the court's decision, but the court declined to be so guided.

The court says:

> "It is stated that the city council have heretofore construed the ordinance in question according to the construction now placed thereon by appellee, and it is urged that by reason of such fact the city is bound by such construction. We do not agree with such contention. In *People v. Village of Crotty*, 93 Ill., 180, which was an application for *mandamus* to compel respondent to issue a license to the relator to keep a dramshop and pool table, on page 190 it is said: 'It is no answer to what we have here said, that appellee issued licenses to others under the same circumstances that it refused them to appellant, nor is it material that it may have placed its refusal to issue them to appellant upon an improper ground. The fact that appellee may have improperly issued licenses to others by reason of a want of authority to do so, could afford no possible reason why it should issue them to appellant, and if appellee had no right to issue them, it was wholly immaterial upon what ground it placed its refusal.'"
>
> *Harrison v. The People ex rel.*, 195 Ill., reading on page 473.

So the fact that preceding corporation counsels have mistaken the law could not by any rule of interpretation give appellant an immunity against the city's governmental power.

Appellant's Claim under the Act of 1897.

Counsel claim in various portions of their brief that because the People's Company's name is retained, and because the merger took the form of each of the other companies merging with the People's, therefore the present consolidated company retains all of the immunities of the original People's Company, and that those immunities are superimposed by the mere act of merger upon the territory of the other original companies, which were not burdened with these pretended immunities.

The court below apprehended the dangerous character of this claim, and we submit that the statement of it defeats itself.

Several of the constituent companies, notably the original company of all, the Chicago Gas, Light and Coke Company, dating from 1849, had no claim or color of claim of immunity.

Therefore, for illustration, we have a consolidation made up of three companies: "A," with an immunity from control below the sum of three dollars; "B," with an immunity from control below one dollar, and "C," without immunity.

Without the act of 1897 no merger could take place. Under that act they consolidate, and for reasons they retain the name of "A" and their papers take the form of the other two merging with "A."

For the year prior to the merger "A" had charged three dollars. The consumers in the territory of "B" enjoyed

gas at a price of one dollar, and those in the territory of "C" could secure a lowering of rate by the council whenever such lowering should be necessary to reach a reasonable price.

Counsel argues that by virtue of this immunity resting in "A" and because the form of merger into "A" was preserved the consolidated company would have the right, under section 11 of the act of 1897, to impose this rate of three dollars on the territory of the other two companies, perpetually. We submit that the legislature could not impose such a hardship, even by express language, yet, if appellant's position is correct, that is the effect of the law of 1897.

Counsel strive to escape from the extraordinary nature of the claim by stating that appellant had voluntarily lowered the rate to one dollar, that this is a fair rate, and the legislature gave the consolidated company the power claimed, having in view that fact.

But that statement will not stand.

If the law is as appellant claims, its rights would be the same as if it had never lowered below three dollars.

According to its logic, all the gas magnates had to do was to retain in the merger the name of the high-charge corporation, to evade perpetually the lower limit enjoyed in the territory of the one company and the subjection to public control enjoyed by the consumers of the third company.

In order to maintain the position that the legislature had in mind the dollar limit, appellant must admit that the talented agents of the gas company took the legislature into confidential relations and whispered into their willing ears certain corporate secrets, namely, that the People's Company name was to be retained, the consolidated company would go by that name, that all other companies were to be merged

therein. That this act was to be passed particularly to enable the Chicago companies to make this merger, that the aforesaid magnates would retain the People's name, instead of that of the older company, the Chicago Company, because there was a supposed fighting chance to claim a contract for high charge in the one case, which was utterly wanting in the other, and that really and candidly (if for no other and more forcible reason) one dollar was a very nice and fair and gentlemanly price to foist on the people of Chicago perpetually.

But counsel would not admit that the legislature reached the knowledge, by this devious method, that one dollar was to be the charge of the new merged company and would be a reasonable price of gas for the people of Chicago to pay perpetually, nor would the court listen to such an argument if offered. But when the court rejects the argument it rejects appellant's case.

Because the legislature could in no other way be aware of the plans and schemes of the gas magnates, and because the act of 1897 must, by virtue of the constitution of 1870, apply to the entire State, and because, as we argue elsewhere, the language of the act cannot be construed to confer on the companies taking advantage of the act any contract whatsoever as to rates, we submit that the decree of the circuit court should be affirmed.

Moreover, if the court were to consider at all the claim that the legislature intended by the act of 1897 to foist any contract on the communities of the State, the court would at least demand that the fact must appear in the act itself in unmistakable language, explicit and certain.

Nothing is more apparent in public matters than the growing tendency to protect the public against the selfish schemes and grasping tendencies of public-service corpora-

tions. It is but an evolution keeping pace with the universal increase in wealth and with the great increase in population.

In the early days so small was the patronage of public-service corporations and so costly all methods of manufacture and transportation that new communities, especially in the West, were willing to make all sorts of concessions to secure the establishment and operation of these public utilities in their midst.

With the increase in the patronage attendant upon great populations and the attendant increase in wealth and decrease in the expense of building and operation, a change has become imperative.

Prices reasonable and proper before and in the sixties become oppressive and exorbitant and unconscionable today.

Instead of communities struggling to get such corporations to perform these public services, the struggle is on the part of the corporations to secure the privilege of operation. No sooner is one of them established than it seeks by legislation, by cabal, and by every method, legal and illegal, by pools, associations, consolidations, and trusts, to secure unconscionable advantages as to rates, charges, and monopolies.

To meet these aggressions and protect itself, the public is on the strain at all times and the courts are kept busy in the defense of the public rights.

It is for this reason, among others, that this court has enforced the rule that no grant giving immunity from public control can be upheld except by the most explicit and unmistakable language.

It is notable in this connection, as before stated, that the act of 1897 was passed after this same original People's Company had attempted to amalgamate with most of these other

companies into what was called the Chicago Gas Trust, and the Illinois supreme court, in the 130 Ill., had defeated the purpose.

This consolidated company was the result of the passage of this act.

Agreeably to the uniform usage in such cases, this legalized monopoly immediately sets up in itself and for itself immunity from public control as to rates throughout the entire city, although on the face of its bill it appears that in some instances, notably in that of the Chicago Gas Company, the constituent companies have not even the color of such a claim.

The construction claimed by appellant, that the merging company whose name is retained shall impose its immunity on all the territory of the merging companies, even where no immunity was originally granted, and thus force upon a community a fixed high price, where it was enjoying a low price by original ordinance, or a regulated price, would be most sinister, and such a construction by this court would invite such legislation that public rights, so far as this class of corporations is concerned, would quickly disappear.

Appellant's reiterated arguments as to the intention of the legislature to protect these helpless corporations from public regulation sound hollow in the light of present conditions.

The law has always protected corporate rights from such fancied danger. Public regulation must always be reasonable.

It needs but a slight insight into public affairs now to see that the legislature's protection of the public, not of the public-service corporations, is what is lacking.

Counsel argue that the city never before attempted to lower the price of gas, and attempt to draw some comfort from that fact.

It may well be that by the careful policy of the old company in voluntarily reducing its prices from time to time the evil day was postponed.

Also it is evident that until a recent date the price of one dollar was a reasonable price.

The record shows that an actual increase of expense occurred between 1855 and 1865, brought on, of course, by the high war prices and the debased currency of that day. Evidently from the high-water-mark rate of 1865 to one dollar was a gradual process. The bill alleges it was a voluntary reduction.

This voluntary giving up would scarcely have taken place, but that such course caused a postponement of the assertions of this right by the city council.

For the same purpose, evidently, were the compromises ending with that of 1899, set out in the bill, where the company contracted to pay the city a percentage of its gross receipts.

So between compromises and "voluntary" reductions and the opinions of certain conservative gentlemen no ordinance was actually passed and became a law until the year 1900, and now counsel claims that this compromise-induced delay constitutes, with the conservative opinions, a contemporaneous exposition equal in force to the decisions of this court.

But there is nothing to this claim, because, even if the council's non-assertion would prove anything, appellant must first show that the price of one dollar had become unreasonable many years ago, and that the city council refrained from reducing the price to a reasonable figure, because it recognized that it had no right so to do before any non-action of the city council could have any bearing on the question.

Counsel refer to the bill prepared by the city council and attempted to be passed, giving cities the right to regulate gas on the lines of the old statute giving them the right to regulate water rates. They claim that the attempt to pass the act is a confession that we did not before have the power. No such deduction can be fairly drawn.

It would ordinarily take less time to get an act passed where the language was so specific that the most grasping monopoly could not question its import than to get a decision from the highest court on the present acts.

There is no confession in trying to save time.

But we are glad that counsel have reminded the court how blithely the legislature gave to appellant and its friends the act of 1897, enabling them to create forbidden monopoly, and how this act, clearing up all question as to the power of the public to fix reasonable rates, was defeated. Appellant is welcome to all the comfort it may get from the comparison.

Learned counsel cite a large number of cases, but we respectfully submit that none of them hold contrary to the well-defined decisions relied upon by us.

The line of decisions from various States cited, where various acts have been construed as not giving the regulating power, would be valuable were it not that this court has passed fully on all the issues involved.

The New Orleans Gas case, 115 U. S., seemingly relied on by appellant to uphold his contention as to the act of 1865, we submit, is not in point for counsel, because the act of 1865 does not, in the set terms required by this court, make a contract.

The legislature, not having seen fit to make a contract itself, could not bind future legislatures not to make one. There is nothing in the New Orleans Gas case that controverts this position. There, there was a contract in terms.

If the legislature of 1865 had in unambiguous language granted the old gas company a contract, the 115 U. S. case would apply. But the legislature declined to give a contract (appellant admits that it retained the right to regulate), and we submit that it could not stipulate what future legislatures would or would not do as to a governmental power such as this.

The New Orleans case passes on a fixed and unambiguous contract.

Counsel again seem to take great comfort in a finding of the appellate court of Illinois in the Hale case, 94 Ill. Appellate; but the reasoning in that case is contrary to the findings of this court, and under the law of the State the decisions of the appellate court are not authoritative.

We urge therefore that the decision of the court below be affirmed for the reasons stated.

Neither the old People's Company under the act of 1865 nor the consolidated company under the act of 1897 derive any immunity from regulation, according to the decisions of this court.

The city derives the power to regulate under the act of 1865, and has never lost the same. And, again, under the law of 1871–'2, the cities and villages act.

It is impossible, we submit, to deny the city's right to regulate under the history of the adoption of the clause *sub-thirteenth*, and after the decision in the Freeport Water

case, sustained by the others cited by us and followed by the Joplin and Owensboro decisions.

To hold that under the act of 1897 a high-price corporation could swallow up low-limit corporations and thereby impose its high rates in the low-rate territory would be to encourage fraud and corporate greed throughout the land.

Respectfully submitted.

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EDGAR B. TOLMAN,
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Of Counsel.

APPENDIX A.

OPINION OF JUDGE GROSSCUP, PUBLISHED JULY 30, 1902.

"I have considered with great care the arguments, both oral and printed, submitted on the rehearing, and see nothing that ought to change the opinion already filed, or the order that followed.

"The only serious question is whether, in view of the recent decision of the Supreme Court of the United States in the Detroit Traction case, the Gas Consolidation Act of 1897, is to be held to embody a contract between the State and the complainant, whereby, from that time forth, gas was to be furnished by the complainant at a fixed rate, unalterable by either party without the consent of the other. The language of the section relied on is as follows: 'Such corporation (the consolidated corporation), shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger.' It is averred that such price for the 'year immediately preceding,' was not less than one dollar per thousand.

"If this rate thus named in the act was meant as a maximum rate only, the Detroit case does not apply; if it was meant, however, as an agreed rate unalterable by either party, the decision does apply.

"The Detroit case announced no new law. It is fundamental that no city or State can constitutionally enact any legislation that impairs the validity of existing contracts. The Detroit case merely held that under the legislation of Michigan the ordinance rate named, though in words a maximum rate only, must be regarded as an agreed fixed rate. The decision does not modify the previous decisions in Illinois water cases where similar language in water ordi-

nances are construed as maximum rates only. The question involved, therefore, is not so much a question of constitutional law as a question of interpretation; namely, what was the legislative intent in the enactment of the Gas Consolidation Act of 1897?

"The act was not special, applying to complainant only. It applies to every gas company and to every city in the State. It contains no mandate, as in the Detroit case, that there shall be an agreed constant rate. It is preceded by no legislation looking to such constant rate. Its language, therefore, must be given its plain ordinary significance; and so construed, I can see in it no purpose other than to fix, not a rate unalterable by either party, but a rate beyond which the consolidated companies may not go. To give it any other interpretation would be to import into the act a strained and artificial meaning.

"I agree with counsel that neither city nor State must be allowed to run over plain contract rights. Against attempts of that kind the courts have always stood as a wall of defense. But it is equally important that no just right of the State should be impaired, nor a meaning put into its legislation that was not intended. When it comes to ascertaining what are the boundaries of the powers of the State, the courts must not forget that there are boundaries to their own powers as well.

"The demurrer to the amended bill will be sustained and the bill dismissed upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the State of Illinois."